STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND CHARLES WASHBURN,

Plaintiff-Appellee,

v

WENDY RENEE WASHBURN,

Defendant-Appellant.

UNPUBLISHED
June 15, 1999

No. 204047
Macomb Circuit Court
LC No. 94-002327 DM

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

WHITBECK, J. (*dissenting*).

I very reluctantly dissent. While I believe that the result reached by the majority in affirming the trial court's recognition of plaintiff as an equitable parent of Justin is clearly preferable, both as a matter of abstract justice and concretely in terms of Justin's best interests, I nevertheless conclude that this result is barred by application of the prior controlling decision in *Van v Zahorik*, 227 Mich App 90; 575 NW2d 566 (1997), lv granted 458 Mich 865 (1998).[1] Thus, I would reluctantly reverse the trial court's holding that plaintiff is entitled to equitable parent status.[2]

I. The Applicability of *Van*

I cannot join my colleagues' determination that *Van, supra*, is not controlling in this case as I believe that they read *Van* too narrowly. As part of its dispositive reasoning, the *Van* panel stated:

> Consequently, because *Hawkins* [*v Murphy*, 222 Mich App 64; 565 NW2d 674 (1997)] did not establish a rule of law on the issue before us, there is no authority requiring us to extend the equitable parent doctrine to a situation where the person seeking to assert the doctrine was not married to the natural parent of the child *at the time the child was born or conceived*, and we think that public policy and judicial restraint prevent us from doing so. [*Van, supra* at 95 (emphasis added).][3]

Thus, in my view, the *Van* panel held as a matter of law, based on public policy and judicial restraint, that the equitable parent doctrine is not to be applied with regard to a child where the person seeking to invoke the doctrine was not married to a biological parent of the child *at the time of the child's*

conception or birth. The *Van* panel also made some comments about the lack of "a legally recognized relationship" between the plaintiff man and defendant woman in that case that fit the particular facts of *Van* more easily than the case at hand because the parties in *Van* never married, see *Van, supra* at 97-98. However, that does not change the holding in *Van* that a claim by a party to equitable parent status to a child will not be recognized where the party was not married to a biological parent of the child *at the time of the child's conception or birth.* In this case, it is undisputed that the parties were not married at the time of Justin's conception or birth. Accordingly, I conclude that, under *Van,* plaintiff may not be recognized as an equitable parent to Justin.[4]

It is true, as emphasized by the majority, that this case is "factually distinguishable" from *Van,* particularly because the parties at hand married when Justin was about one-month-old, while the parties in *Van* never married. See *Van, supra* at 92. However, *any two cases* will differ factually on various bases. If the mere presence of factual differences is enough to justify failing to apply established precedent, the concept of binding precedent central to our jurisprudence would be rendered meaningless. MCR 7.215(H)(1) provides:

> A panel of the Court of Appeals must follow *the rule of law* established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. [Emphasis added.]

Despite the important and remarkable factual differences between this case and *Van,* "the rule of law" enunciated in *Van* that a person who was not married to a biological parent of a child at the time of the child's conception or birth cannot be recognized as an equitable parent of the child is applicable to this case. Because *Van* was a published opinion issued after November 1, 1990, this panel is bound by *Van.*

II. My Disagreement With the Controlling Portion of *Van*

I believe that the majority errs legally by failing to apply *Van, supra,* which absolutely limits the availability of a claim of equitable parent status to a party who was married to a biological parent of the involved child at the time of the child's conception or birth. However, were I in the majority, I would follow the pertinent holding of *Van* in an opinion for publication only because I believe that result is required by MCR 7.215(H)(1). Thus, I would invoke the "conflicting opinion" procedure of MCR 7.215(H)(2)-(3). Accordingly, I explain below my rationale for disagreeing with the pertinent holding in *Van.*

A. The Overarching Concern - The Best Interests of the Child

As then Judge Corrigan wrote for the unanimous panel of this Court in *Heid v AAASulewski,* 209 Mich App 587, 595; 532 NW2d 205 (1995), "[i]n any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child." The majority in *Van* stated "the overriding concern must be the best interest of the child," *Van, supra* at 98. However, the holding in *Van,* by categorically precluding a recognition of equitable parent status in favor of a person who is not

married to a biological parent of the child at the time of the child's conception or birth, fails to serve the best interest of children. Using the facts of this case as a reference, Justin was only about one-month-old when the parties married. As my colleagues so rightly point out, plaintiff is the only father that Justin had ever known. While there *may* be some reason for concern about this particular plaintiff's parenting abilities in light of aspects of his past conduct,[5] the presence or absence of such concerns is immaterial to the holding in *Van*. One may easily imagine a circumstance in which a woman and man married about a month after she bore a child fathered by a different man and after which the husband acted as an excellent parental figure to that child and was treated by the mother and child as the child's father, while the biological father played no role in raising the child. By the time the child was nine-years-old (Justin's current age), that child would almost certainly – and rightly – regard the man who participated in raising him, and who was for practically as long as the child could remember the legal husband of the child's mother, as his father. Failing to recognize this would deny the reality of emotional bonds as they typically form between human beings, in particular between parents and children. I believe that it is utterly inconsistent with concern for the best interests of the child to allow a biological mother in such circumstances to destroy unilaterally the emotional bond between the child and the man who, despite biology and legal formality, has been in practical terms the child's father.

Further, recognition of the equitable parent doctrine as extending to some circumstances in which the party claiming equitable parent status was not married to a biological parent of the child at the time of the child's conception or birth is consistent with concerns that led this Court to adopt the equitable parent doctrine in *Atkinson v Atkinson*, 160 Mich App 601, 608-612; 408 NW2d 516 (1987). The unanimous panel in *Atkinson* referred to this Court's earlier decision in *Johnson v Johnson*, 93 Mich App 415, 419-420; 286 NW2d 886 (1979), in which this Court held that a man who married his wife knowing that she was pregnant with a child who may or may not have been fathered by him and who thereafter held himself out as the father and supporter of the child for several years was estopped from denying paternity of the child. *Atkinson*, *supra* at 609-610. The *Atkinson* panel further stated:

> It is the logical extension of *Johnson* to recognize that, under certain circumstances, a person who is not the biological father of a child may be considered a parent when he desires such recognition and is willing to support the child as well as wants the reciprocal rights of custody or visitation afforded to a parent. Such circumstances are present here. Baird was conceived and born during the parties' marriage. Plaintiff and Baird have always had a close and affectionate father-son relationship. *Plaintiff is the only father Baird has ever known and is active in Baird's life. He desires to have the relationship continued and to have the rights accorded to a father, along with the responsibility of supporting the child. Defendant acknowledged at trial that plaintiff related to Baird as a father* and that she waited until answering a question in interrogatories filed by plaintiff in the instant divorce action before asserting that plaintiff was not Baird's biological father. Under this set of facts, plaintiff is clearly entitled to be treated as a natural father under the doctrine of equitable parent. [*Id.* at 610-611 (emphasis added).]

Similarly, in the case at hand, plaintiff was the only father that Justin knew and continues to seek to have the legal rights – and responsibilities – attendant to being recognized as a legal parent to Justin. Also, defendant acknowledged below that plaintiff acted as Justin's father since Justin's birth, that she encouraged such a relationship, and that Justin considered plaintiff to be his father. In my view, there can be no serious question but that, aside from legal formalities and despite plaintiff's human frailties, plaintiff is Justin's "father." I find it self-evident that it is insignificant to this father-child relationship that the parties married each other about one month after Justin's birth, rather than one day before Justin's birth.

In light of the foregoing considerations, were this panel free to properly do so, I would recognize the equitable parent doctrine as extending at least to circumstances where, as here, a man claiming equitable parent status has married the biological mother of the involved minor child shortly after the child's birth and the man fulfills the three pronged test of *Adkinson, supra* at 608-609. I would recognize this extension, even though the man was not married to the biological mother of the child when the child was conceived or born.

B. Deference to the Legislature

The *Van* majority stressed the principle of deference to the Legislature. I strongly agree with the general principle of deference to the Legislature where it has spoken through duly enacted statutes. However, the Legislature has *not* spoken as to the scope of the equitable parent doctrine. This Court first adopted the equitable parent doctrine in *Atkinson, supra,* in 1987. Since that time, the Legislature has not acted to override the equitable parent doctrine or otherwise define the scope of situations in which equitable parent status may be recognized, despite having made various amendments to the Child Custody Act, MCL 722.21 *et seq.;* MSA 25.312(1) *et seq.* "[W]here legislation has been authoritatively construed by the courts, then retained by the Legislature, we will find legislative concurrence." *Rogers v Detroit,* 457 Mich 125, 140; 579 NW2d 840 (1998). Quite similarly, despite making various amendments to the Child Custody Act since this Court first recognized the equitable parent doctrine, the Legislature has not acted to define the scope of the doctrine or to abolish equitable parenthood.

III. Conclusion

I conclude that a proper application of *Van, supra,* would, regrettably, require a holding that defendant lacks a cognizable legal claim to be an equitable parent of Justin. This conclusion is entirely based on the fact that the parties were not married to each other at the time of Justin's conception or birth. Under the pertinent holding of *Van,* there is a flat ban on recognizing a claim of equitable parent status advanced by a person who was not married to a biological parent of the involved minor child at the time of the child's conception or birth. Unless *Van* is overruled in pertinent part by the Michigan Supreme Court after release of this opinion but before consideration of an application for leave in this case, I urge the Michigan Supreme Court to consider this case, if leave to appeal is sought, but to *affirm* the result of the majority opinion by taking the step that we cannot: overruling the pertinent portion of *Van* and holding that, at least in circumstances like those present in this case, the equitable

parent doctrine may be applied even though the party claiming equitable parent status was not married to a biological parent of the involved child when the child was conceived or born.

While I concur with much of the sentiment of my colleagues, I respectfully and reluctantly dissent from their opinion.

/s/ William C. Whitbeck

[1] I note that the Michigan Supreme Court, which granted leave to appeal from this Court's decision in *Van*, heard oral argument in that case on March 9, 1999 (ironically the same date that this panel heard oral argument in the present case). Thus, whether the pertinent holding of this Court in *Van* will continue to remain good law for much longer is an open question. However, at this point, the holdings in *Van* remains in full force. "[A] Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

[2] I note that the trial court's decision in this case was rendered before this Court released its decision in *Van, supra*. Given that I believe *Van* was wrongly decided at least with regard to its pertinent holding, I obviously do not believe the trial court should be criticized for reaching what appears to me to have been the right decision at the time that it was made.

[3] Similarly, the *Van* panel stated later in its opinion:

> In sum, the equitable parent doctrine has previously been applied only in situations where a child was born or conceived during a marriage, to convey equitable parenting status on a husband who was not the biological father of the child. Because of the magnitude of the policy considerations involved in extending application of the doctrine outside such circumstances and the presence of a complex statutory scheme dealing with such issues, we defer to the Legislature and decline to accord plaintiff equitable parent status. [*Van, supra* at 99.]

[4] While not reached by the majority, I would also reject plaintiff's alternative argument based on equitable estoppel. Under *Van, supra* at 100-102, equitable estoppel may not be invoked by a so-called "third party" against a biological parent of a child to obtain visitation rights to the child.

[5] Nevertheless, the fact that plaintiff sought and obtained equitable parent status below and is defending that status in this appeal is, as suggested by my colleagues, a strong indication of his love and concern for Justin.